Mohamad Salman bin Malzuki v Dato' Mohan Singh a/l Tara Singh, Penolong Pesuruhajaya Kanan Polis ('Senior Assistant Commissioner of Police') Chairman of the Disciplinary Board appointed by the Police Commissioner & Ors

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO 25–290–11 OF 2015
HANIPAH FARIKULLAH J
12 JANUARY 2017

Administrative Law — Dismissal from service — Dismissal from police force, whether wrongful — Employee a police constable — Dismissed by disciplinary authority for absence without leave or prior permission — Application for certiorari to quash decision of disciplinary authority — No oral hearing held — Whether breach of natural justice — Whether show cause letter defective — Whether decision making process tainted with illegality, irrationality and procedural impropriety — Public Officers (Conduct and Discipline) Regulations 1993

Civil Procedure — Judicial review — Application for — Employee police constable — Dismissed by disciplinary authority for absence without leave or prior permission — Application for certiorari to quash decision of disciplinary authority — No oral hearing held — Whether breach of natural justice — Whether show cause letter defective — Whether decision making process tainted with illegality, irrationality and procedural impropriety

The applicant ('former police constable') was dismissed by the respondent ('the disciplinary authority') after being found guilty of absence without leave or without prior permission. Dissatisfied with the respondent's decision, the applicant filed for judicial review seeking, amongst others, a certiorari to quash respondent's decision, a mandamus to direct respondent to reinstate applicant to the police force and an order seeking various emoluments from date of dismissal to reinstatement. The issues that arose were: (a) whether the show cause letter given to the applicant was defective; (b) whether there was a breach of natural justice; and (c) whether the decision making process was tainted with illegality, irrationality and procedural impropriety.

Held, dismissing the application with costs of RM3,000 subject to the allocator fees:

(1) The erroneous reference to the wrong regulation, namely reg 36 instead of reg 37 did not vitiate or invalidate the decision to dismiss the

applicant. It had to be noted that the main title or heading of the letter made clear reference to the reg 37 and repeated in the letter through para 3. The respondent's intention to pursue a disciplinary proceeding under reg 37 was crystal clear and the usage of reg 36 of the show cause letter was a clerical error. Hence the order could not be challenged as illegal, null and void on the mere ground that there was a clerical error in the show cause letter and this would not affect the power to impose punishment pursuant to the Regulations (see paras 34 & 36).

(2) The applicant's right to be heard was not infringed in any manner. The respondent had clearly allowed the applicant ample opportunity to make written representation and to give justifications for the charges. The applicant made written representation, admitted to the charges and expressed deepest regret for committing the disciplinary offences. In this case, the respondent did not require further clarification from the applicant, as such, there was no requirement to conduct an oral hearing (see paras 46–49).

(3) The court could only interfere when there was an obvious irrationality in the decisionmaking process. In the present case, the respondent complied with the requisite statutory procedures in coming to the disciplinary actions against the applicant. The respondent was best suited to judge the applicant's misconduct and the proper disciplinary action to be taken against the applicant (see paras 59–61).

[Bahasa Malaysia summary

Pemohon ('seorang bekas konstabel polis') telah dibuang kerja oleh responden ('lembaga tatatertib') setelah didapati bersalah atas kesalahan ketidakhadiran tanpa izin atau tanpa kebenaran awal. Tidak berpuas hati dengan keputusan responden, pemohon memfailkan semakan kehakiman untuk memohon, antara lain, certiorari bagi membatalkan keputusan responden, mandamus mengarahkan responden untuk mengembalikan semula pemohon ke dalam pasukan polis dan satu perintah untuk mendapatkan pelbagai bentuk emolumen-emolumen dari tarikh pembuangan kerja sehingga ke pengembalian semula. Isu-isu yang berbangkit adalah: (a) sama ada surat tunjuk sebab yang diberi kepada pemohon bersifat cacat; (b) sama ada terdapat kemungkiran keadilan asasi; dan (c) sama ada proses yang diambil untuk membuat keputusan telah dicemari ketidaksahan, tidak rasional dan gagal mematuhi prosedur.

Diputuskan, permohonan ditolak dengan kos sebanyak RM3,000 dan tertakluk kepada yuran alokatur:

(1) Kesilapan dalam membuat rujukan ke peraturan yang salah, iaitu ke peraturan 36 bukan sebaliknya ke peraturan 37 tidak melemahkan atau membatalkan keputusan untuk membuang pemohon dari kerja. Harus

diperhatikan bahawa tajuk utama atau kepala surat telah membuat rujukan jelas ke peraturan 37 dan ianya diulangi di dalam surat di perenggan 3. Hasrat responden untuk menjalankan prosiding disiplin di bawah peraturan 37 adalah amat jelas dan penggunaan peraturan 36 dalam surat tunjuk sebab adalah satu kesilapan perkeranian. Justeru, perintah tersebut tidak boleh dipertikaikan sebagai menyalahi undang-undang, batal dan tidak sah berdasarkan hanya atas alasan terdapat satu kesilapan perkeranian dan ini tidak akan mengugat kuasa untuk mengenakan hukuman menurut Peraturan-Peraturan (lihat perenggan 34 & 36).

(2) Hak pemohon untuk bersuara tidak dikekang dalam apa cara sekalipun. Pihak responden telah secara nyata memberikan pemohon peluang secukupnya untuk membuat representasi bertulis dan memberikan justifikasi-justifikasi terhadap tuduhan-tuduhan tersebut. Pihak pemohon telah membuat representasi bertulis, mengaku tuduhan-tuduhan tersebut dan merakamkan kekesalan kerana melakukan kesalahan-kesalahan disiplin. Di dalam kes ini, responden tidak memerlukan penjelasan lanjut dari pemohon, dan oleh itu, tidak ada keperluan untuk mengadakan pendengaran (lihat perenggan 46–49).

(3) Mahkamah hanya boleh campur tangan bila terdapat ketidakrasionalan yang jelas dalam proses membuat keputusan. Dalam kes ini, responden telah mengikut prosedur-prosedur statut yang perlu dalam menentukan tindakan-tindakan disiplin terhadap pemohon. Responden merupakan pihak yang sesuai untuk mengadili tindakan salah laku pemohon dan mengambil tindakan disiplin yang sewajarnya terhadap pemohon (perenggan 59–61).]

Notes

For cases on application for judicial review, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5937–5949.

For cases on dismissal from police force, whether wrongful, see 1(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 52–54.

Cases referred to

Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 All ER 935; [1985] AC 374, HL (refd)

Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 MLJ 114; [1994] 2 CLJ 333, SC (refd)

N Mani v Sangeetha Theatre and Others (2004) 12 SCC 278, SC (refd)

Ng Hock Cheng v Pengarah Am Penjara & Ors [1998] 1 MLJ 153; [1998] 1 CLJ 405, FC (folld)

Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu

(substituting M Senthivelu a/l R Marimuthu, deceased) [2008] 6 MLJ 1; [2008] 6 CLJ 573, FC (refd)

Legislation referred to

Federal Constitution art 135(2)
Public Officers (Conduct and Discipline) Regulations 1993 regs 35, 35(1), 36, 36(1), 37, 37(1), (2), (4), (5), 38, 52, Part V, Chapter 3

Simon Murali (Murali & Co) for the applicant.
Natra Idris (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Hanipah Farikullah J:

[1] This is a judicial review application filed by the applicant on 6 November 2015 in order to challenge a disciplinary order ('the order') dated 21 July 2015 which caused the applicant to be dismissed from the police force.

[2] In gist, the relief sought by the applicant are as follows:

(a) an order of certiorari to quash the decision of disciplinary authority dated 21 July 2015 dismissing the applicant from the police force effective from 10 July 2015;

(b) an order of mandamus directing the respondents to restore back the applicant to its original position in the service; and

(c) an order that the respondents pay all the salary, allowance and other benefits that the applicant should have enjoyed from his dismissal to the date of his reinstatement;

[3] Learned counsel for the applicant had relied on two main grounds in support of the application, which are as follows:

(a) there is an element of procedural impropriety since the disciplinary inquiry was not conducted in accordance with provisions spelled out in the show cause letter dated 7 July 2014; and

(b) the respondents' decision to dismiss the applicant on the last seven charges is wholly irrational.

[4] On the other hand, learned senior federal counsel who acted on behalf of the respondents had replied to the applicant's submission by giving a detail submission on these issues:

(a) whether the show cause letter given to the applicant is defective;

A (b) whether the decision of disciplinary authority in imposing different punishments against the charges is inconsistent, wrong, unfair and unreasonable;

(c) whether there was a breach of natural justice;

B (d) whether the applicant was denied of his rights to access the documents needed to prepare his defense; and

(e) whether the decision making process was tainted with illegality, irrationality and procedural impropriety.

C FACTS OF THE CASE

[5] The applicant was a former police officer with the Malaysian Police Force holding the rank of Constable stationed at Lokap Berpusat Jinjang.

D **[6]** The applicant was alleged to have absence from work/duties without leave or without prior permission of his head of department (in alternate).

[7] Disciplinary action was taken against him under the Public Officers E (Conduct and Discipline) Regulations 1993 ('the 1993 Regulations') with a view to dismissal and/or reduction in rank.

[8] The first respondent had issued a show cause letter dated 7 July 2014 which was received by the applicant on 14 July 2014, informing him of the 15 F allegations of misconduct against him, with a view to dismissal from service.

[9] All the charges are similar in content, in that the applicant was alleged to be 'tidak bertanggungjawab' for being absent from work at the designated place of duty. G

[10] The charges can be conveniently summarised as follows:

	Alleged Offence	Dates
(a) First charge	Absent from work seven days	3 July 2012
H		4 July 2012
		12 July 2012
		23 July 2012
		28 July 2012
I		30 July 2012
		31 July 2012
(b) Second charge	Absent from work 12 days	1 August 2012
		2 August 2012
		7 August 2012

		11 August 2012
		13 August 2012
		15 August 2012
		17 August 2012
		19 August 2012
		20 August 2012
		25 August 2012
		29 August 2012
(c) Third charge	Absent from work seven days	10 September 2012
		13 September 2012
		22 September 2012
		30 September 2012
		5 October 2012
		20 October 2012
		21 October 2012
(d) Fourth charge	Absent from work four days	2 December 2012
		11 December 2012
		25 December 2012
		31 December 2012
(e) Fifth charge	Absent from work eight days	1 January 2013
		5 January 2013
		12 January 2013
		18 January 2013
		22 January 2013
		25 January 2013
		26 January 2013
		31 January 2013
(f) Sixth charge	Absent from work eight days	7 February 2013
		17 February 2013
		1 March 2013
		7 March 2013
		13 March 2013
		15 March 2013
		21 March 2013
		25 March 2013
(g) Seventh charge	Absent from work four days	17 April 2013
		19 April 2013
		22 April 2013
		30 April 2013
(h) Eighth charge	Absent from work nine days	9 May 2013
		11 May 2013
		12 May 2013

		13 May 2013
		15 May 2013
		17 May 2013
		19 May 2013
		22 May 2013
		27 May 2013
(i) Ninth charge	Absent from work eight days	4 June 2013
		5 June 2013
		6 June 2013
		8 June 2013
		12 June 2013
		15 June 2013
		23 June 2013
		30 June 2013
(j) Tenth charge	Absent from work ten days	4 July 2013
		5 July 2013
		9 July 2013
		12 July 2013
		13 July 2013
		15 July 2013
		17 July 2013
		19 July 2013
		27 July 2013
		28 July 2013
(k) Eleventh charge	Absent from work eight days	2 August 2013
		4 August 2013
		5 August 2013
		8 August 2013
		9 August 2013
		10 August 2013
		18 August 2013
		22 August 2013
(l) Twelfth charge	Absent from work five days	1 September 2013
		5 September 2013
		12 September 2013
		14 September 2013
		20 September 2013
(m) Thirteenth charge	Absent from work five days	1 October 2013
		16 October 2013
		20 October 2013
		23 October 2013

		24 October 2013
(n) Fourteenth charge	Absent from work four days	12 November 2013
		22 November 2013
		25 November 2013
		26 November 2013
(o) Fifteenth charge	Absent from work five days	4 December 2013
		18 December 2013
		28 December 2013
		11 March 2014
		15 March 2014

[11] The said show cause letter clearly stated that the applicant could be punished under reg 38 of the 1993 Regulations if found guilty by the disciplinary authority. The applicant was given 21 days from the receipt of the said letter to furnish his representation to exculpate himself from the charges.

[12] By letter dated 16 July 2014, the applicant made his representation in response to the show cause letter.

[13] Vide letter dated 21 July 2015, the applicant was informed that the disciplinary authority in the meeting held on 10 July 2015 had considered the charges against the applicant as well as his representation and found that the applicant had failed to exculpate himself from the charges preferred against him.

[14] The disciplinary authority had found the applicant guilty as charged and imposed the punishments of:

(a) warning for the first, second, third and fourth charges;

(b) fine RM50 for the fifth, sixth and seventh charges; and

(c) dismissal for the eighth, ninth, tenth, 11th, 12th, 13th, 14th and 15th charges.

[15] The punishments took effect from 10 July 2015.

[16] Being dissatisfied with the order, the applicant had filed a judical review application at this court.

ISSUES

[17] Based on the contentions put forwarded by both of the parties, I am of the opinion that substantial issues which have merits and need to be discussed in detail in this case are as follows:

(a) whether the show cause letter given to the applicant was defective;

(b) whether there was a breach of natural justice; and

(c) whether the decision making process was tainted with illegality, irrationality and procedural impropriety.

DISCIPLINARY PROCEEDINGS UNDER THE 1993 REGULATIONS

[18] The disciplinary proceedings concerning public officers are governed by the 1993 Regulations, including all the necessary amendments made thereunder and applicable at the material time.

[19] The salient provisions of the 1993 Regulations applicable to the case at hand as follows:

(a) Part V — Chapter 3 sets out the procedure pertaining to dismissal or a reduction in rank of a public officer. Regulation 35 empowers the disciplinary authority to determine the nature of the breach of discipline, whether it warrants a punishment of dismissal or reduction in rank. If the breach warrants a dismisaal or a reduction in rank, the disciplinary authority should follow the procedure in reg 37;

(b) under reg 37(2), if the disciplinary authority is satisfied that there exists a prima facie case against the officer, he shall cause a letter to be sent to the officer containing the facts of the disciplinary offence and the grounds on which it is proposed to dismiss the officer or to reduce his rank. The officer is then required to make a representation not less than 21 days containing the grounds upon which he relies to exculpate himself;

(c) under reg 37(4), if the officer does not furnish any representation within the period specified or that his representation 'does not exculpate himself to the satisfaction of the Disciplinary Authority', the disciplinary authority shall proceed to consider and decide whether to dismiss or reduce his rank;

(d) under reg 37(5), if the disciplinary authority considers that a case against the officer requires further clarification, it may appoint a Committe of Investigation; and

(e) the disciplinary authority will then make a finding of guilt and impose the punishment of dismissal as provided under reg 38.

DECISION WHETHER THE SHOW CAUSE LETTER GIVEN TO THE APPLICANT WAS DEFECTIVE

[20] Referring to the show cause letter dated 7 July 2014, the contents of the second paragraph preceding the enumeration of the 15 charges reads:

> Pada menjalankan kuasa-kuasa yang telah diwakilkan oleh Suruhjaya Pasukan Polis melalui Suratcara Perwakilan Kuasa PU(B) 441 bertarikh 14.12.2000, saya selaku Pengerusi Lembaga Tatatertib, setelah menimbang segala maklumat yang ada, telah berpuas hati bahawa wujudnya kesalahan tatatertib yang mematutkan anda dikenakan tindakan tatatertib di bawah Peraturan 36, Peraturan-Peraturan Pegawai Awam [Kelakuan dan Tatatertib] 1993 atas fakta-fakta seperti berikut:– ...

[21] In order to appreciate the arguments submitted by the applicant it is necessary to reproduce the laws provided under the 1993 Regulations. Regulations 35(1), 36(1) and 37(1) of the 1993 Regulations stipulated as follows:

> 35 *Chairman of Disciplinary Authority to determine nature of breach of discipline*
>
> (1) Where an officer is alleged to have committed a disciplinary offence —
>
> (a) the Chairman of the Disciplinary Authority appropriate to that officer; or
>
> (b) if there is more than one tier of Disciplinary Authority in respect of such officer, the Chairman of the Disciplinary Authority having the jurisdiction to impose a punishment other than dismissal or reduction in rank,
>
> shall, before commencing any disciplinary proceedings in respect of the officer, consider and determine whether the disciplinary offence compalined of is of a nature which warrants a punishment of dismissal or reduction in rank or a punishment lesser than dismissal or reduction in rank.
>
> 36 *Procedure in disciplinary cases not with a view to dismissal or reduction in rank*
>
> (1) If it is determined under subregulation 35(2) that the disciplinary offence complained of against an officer is of a nature that warrants a punishment lesser than dismissal or reduction in rank, the appropriate Chairman of Disciplinary Authority referred to in paragraph 35(1)(a) or (b), on being satisfied that there exists a disciplinary offence, shall inform the officer by notice in accordance with regulation 52 of the facts of the disciplinary offence alleged to have been committed by him and shall give to the officer an opportunity to make a written representation within a period of twenty one days from the date he is informed of the facts.
>
> 37 *Procedure in disciplinary cases with a view to dismissal or reduction in rank*
>
> (1) If it is determined under subregulation 35(2) that the disciplinary offence complained of against an officer is of a nature that warrants a punishment of

dismissal or reduction in rank, the Chairman of the appropriate Disciplinary Authority to which the case if referred shall consider all the available information.

[22] Regulation 35(1) of the 1993 Regulations mandates that a chairman of the disciplinary authority, before pursuing disciplinary action against any officer, should first consider and determine whether the disciplinary offence complained of is of the nature that ought to be penalised by dismissal from service or reduction in rank, or whether it is an offence for which a lighther penalty ought to be imposed.

[23] Based on regs 36(1) and 37(1), if the chairman of the disciplinary authority is satisfied that the disciplinary offence complained of is of the nature that attracts a lighter penalty, then the chairman should proceed with steps provided under reg 36. On the other hand, if the chairman found the offence to be of a grave nature for which reduction in rank or dismissal from service ought to be imposed as punishment, then the chairman should proceed with steps provided under reg 37.

[24] In consequence to that, it must be highlighted that under reg 36(1), it has also been provided that the chairman of the disciplinary authority shall issue a notice to inform the officer in accordance with reg 52 of the facts of the offence alleged to have been committed by him and shall give the officer to make a written representation within a period of 21 days from the date he is informed of the facts.

[25] Based on the show cause letter, the first respondent referred to both regs 36 and 37, whereby the heading of the letter and its penultimate paragraph referred to reg 37 and the vital part of its contents referred to reg 36.

[26] It was submitted by the applicant's solicitor that the relevant portion of the show cause letter unequivocally expressed that the applicant was subjected to a disciplinary action under reg 36. Hence, the respondents' decision to dismiss the applicant from the police force for the ninth to the 15th charge is invalid, as reg 36 deals only with disciplinary offences that carry punishment lighter than reduction in rank or dismissal.

[27] It was also submitted that the decision to dismiss is not in accordance with the prescribed procedural provision and therefore is illegal.

[28] It was also further argued by the applicant's solicitor that the applicant is entitled to know whether the board was pursuing a disciplinary action under reg 36 or reg 37. The applicant must be clearly notified and made to understand whether the charges against him are punishable with the drastic penalty of dismissal or reduction in rank, or otherwise.

[29] It is the applicant's position that the failure of the first respondent to clearly specifiy in the show cause letter the exact Regulation that the first respondent is referring to in pursuing the disciplinary action against the applicant, there was a gross failure to accord the applicant with a reasonable opportunity to be heard.

[30] The learned senior federal counsel ('SFC') on the other hand submitted that it is their stand that the disciplinary action was taken against the applicant under reg 37 of the 1993 Regulations with a view to and/or reduction in rank.

[31] It was further submitted by the learned SFC that reg 36 which appeared in the show cause letter was a clerical error and wrongly quoted. This had been averred by the respondents in their affidavit in reply dated 7 April 2016 affirmed by the first respondent which is reproduced as follows:

> 11. Merujuk kepada keseluruhan Perenggan 20 Afidavit Pemohon, saya sesungguhnya percaya dan menyatakan seperti berikut:
>
> 11.1 Peraturan 36 yang tertera di perenggan 2 surat Tindakan Tatatertib bertarikh 7.7.2014 adalah suatu kesilapan perkeranian (clerical error) yang tidak disengajakan.
>
> 11.2 Pihak Berkuasa Tatatertib yang membuat penentuan di bawah Peraturan 35 PPPA (K&T) 1993 mendapati kesalahan tatatertib yang dilakukan oleh Pemohon adalah daripada jenis yang patut dikenakan hukuman buang kerja atau turun pangkat di bawah Peraturan 37 PPPA (K&T) 1993.
>
> 11.3 Memandangkan penentuan kesalahan tatatertib Pemohon adalah daripada jenis yang patut dikenakan hukuman buang kerja atau turun pangkat, Pihak Berkuasa Tatatertib telah merujuk kes Pemohon kepada saya selaku Pihak Berkuasa Tatatertib yang mempunyai bidang kuasa untuk mengenakan hukuman sedemikian di bawah Peraturan 35(2) PPPA (K&T) 1993.
>
> 11.4 Ini menunjukkan dengan jelas bahawa Lembaga Tatatertib menjalankan prosiding tatatertib terhadap Pemohon di bawah Peraturan 37 PPPA (K&T) 1993.
>
> 11.5 Selanjutnya, saya selaku Pengerusi Lembaga Tatatertib mendapati bahawa wujud suatu kes prima facie terhadap Pemohon yang mewajarkan Pemohon dikenakan tindakan tatatertib dengan tujuan buang kerja atau turun pangkat di bawah Peraturan 37 PPPA (K&T) 1993 di atas lima belas (15) pertuduhan.
>
> 11.6 Surat Tindakan Tatatertib bertarikh 7.7.2014 dibuat dengan tajuk 'TINDAKAN TATATERTIB DI BAWAH PERATURAN 37. PPPA (KELAKUAN TATATERTIB) 1993, DENGAN TUJUAN BUANG KERJA ATAU TURUN PANGKAT DI BAWAH PERATURAN 38, PERATURAN-PERATURAN YANG SAMA'.

11.7 Kandungan perenggan 3 surat Tindakan Tatatertib juga menunjukkan niat Lembaga Tatatertib bahawa tindakan tatatertib terhadap Pemohon adalah dijalankan di bawah Peraturan 37 dan bukannya Peraturan 36.

11.8 Tambahan, Pemohon juga sedia maklum bahawa prosiding tatatertib terhadap Pemohon adalah di bawah Peraturan 37 PPPA (K&T) 1993 berdasarkan kepada surat representasi yang telah dikemukakan kepada beliau.

11.9 Kesilapan perkeranian dalam perenggan 2 surat Tindakan Tatatertib tidak boleh dijadikan asas bahawa terdapat kesilapan prosedur yang menjejaskan prosiding tatatertib yang telah dijalankan terhadap Pemohon.

11.10 Lembaga Tatatertib mempunyai kuasa budi bicara untuk mengenakan apa-apa bentuk hukuman yang wajar dikenakan berdasarkan kepada keseriusan kesalahan yang dilakukan dan juga merit sesuatu kesalahan. Keputusan hukuman amaran, denda RM50 dan buang kerja yang dilakukan ke atas Pemohon dibuat selaras dengan Peraturan 37(3) dan 38 PPPA (K&T) 1993.

[32] Therefore, it was contended by the learned SFC that by merely quoting the wrong regulation does not affect the validity of the decision of the disciplinary authority in imposing the punishment of dismissal. The erroneous reference to the wrong regulation, namely reg 36 instead of reg 37 does not vitiate or invalidate the decision to dismiss the applicant.

[33] The learned SFC had made a reference to the case of *N Mani v Sangeetha Theatre and Others* (2004) 12 SCC 278 where the Supreme Court held as follows:

> 9. It is well settled that if an authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law.

[34] In regard to this issue, I accept the contentions submitted by the learned SFC. It has to be noted that the main title or heading of the letter clearly made reference to reg 37. Such reference has been repeated in the letter through para 3. The respondents' intention to pursue a disciplinary proceeding under reg 37 was crystal clear and I accept that the usage of reg 36 under para 2 of the show cause letter was a clerical error.

[35] I agree with the learned SFC's submission that based on the applicant's representation letter, the applicant was fully aware and under that the disciplinary proceedings initiated against him was with the view of dismissal or reduction in rank under reg 37.

[36] Hence, in my view the order cannot be challenged as illegal, null and void just on the mere ground that there was a clerical error in the show cause letter. As stated in the case of *N Mani v Sangeetha Theatre and Others* referred by the learned SFC, an express power has been given to the chairman to impose such punisment in pursuant to reg 37 of the 1993 Regulations, hence a clerical error in the show cause letter will not affect the power given by the 1993 Regulations to the first respondent.

WHETHER THERE WAS A BREACH OF NATURAL JUSTICE

[37] In relation to this issue, it is substantial to make reference to art 135(2) of the Federal Constitution which provided as follows:

> (2) No member of such service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard.

[38] The applicant's solicitor submitted that the respondents failed to adhere to the principles of natural justice, in particular on the maxim of 'audi alteram partem'.

[39] It was contended by the applicant's solicitor that there was a blatant contravention of art 135(2) of the Federal Constitution since the dismissal of the applicant was made without giving the applicant a reasonable opportunity to be heard whereby this contention arose from the clerical error in the show cause letter.

[40] On the other hand, the learned SFC had relied on the case of *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114; [1994] 2 CLJ 333. In this case, it was held by the Supreme Court that:

> [4] It ought to be taken as settled that the term 'opportunity of being heard' or 'right to be heard' or 'being heard', in the context of the rules of natural justice, does not entail any obligation to hold an inquiry and likewise the word 'hearing' does not mean oral hearing. What is important, as is the case here, is that the officer concerned should have a full opportunity of stating his case before he is dismissed. In this case the respondent has not failed to observe the rules of natural justice when dismissing the appellant as there was no failure in the duty to act fairly.

[41] The learned SFC had also referred to the case of *Public Services*

A *Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased)* [2008] 6 MLJ 1; [2008] 6 CLJ 573. It was held by the Federal Court as follows:

B > From the provision of the general orders it is clear that it is never the intention of the legislators that the courts should step into the shoes of the disciplinary authority in deciding whether it was fair to the respondent to have granted him a right to make oral representations or whether he should be given such right although he did not ask for it.

C **[42]** It was contended by the learned SFC that the pertinent question to be asked in this case is whether the right to be heard in art 135(2) of the Federal Constitution includes a right to an oral hearing.

D **[43]** By relying on the above authorities, it was submitted by learned SFC that it has been established that the principle of the right to be heard orally at common law does not apply to a case regulated by statutes or subsidiary regulations which have legislative effect.

E **[44]** In any event, for the applicant's case, the right to an oral hearing has been specifically provided under reg 37(5) of the 1993 Regulations which clearly provides that if the disciplinary authority is of the opinion that the case against the officer requires further clarification, the disciplinary authority 'may establish an Investigation Committee for the purpose of obtaining such further clarification'. However, it was submitted by the learned SFC that the regulation is not applicable to the applicant since the first respondent did not require any clarification from the applicant.

F

G **[45]** It was also submitted by the learned SFC that the applicant was given the opportunity to state his case through the letter of representation and the disciplinary offences stated in the charges were clear, unequivocal and easily understood by any reasonable person.

H **[46]** In line with reg 37(5) of the 1993 Regulations which has vested a power to the disciplinary authority to conduct an oral hearing if a further clarification is needed, I accept the learned SFC's contention that in this case, the first respondent did not require any further clarification or explanation from the applicant, which explains why an oral hearing is not necessary in this case. There was no requirement to conduct one.

I **[47]** Referring to the applicant's contention that the applicant was not given a reasonable opportunity to be heard, after perusing the show cause letter dated 7 July 2014, I am of the opinion that the first respondent had clearly allowed

the applicant an opportunity to make a written representation and to give justifications for the alleged charges. This can be seen through para 3 of the show cause later which states as follows:

> 3. Mengikut Peraturan 37, Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993, anda adalah dikehendaki mengemukakan satu representasi secara bertulis yang mengandungi alasan-alasan yang anda bergantung untuk membebaskan diri anda. Representasi tersebut hendaklah dikemukakan kepada saya selaku Pengerusi Lembaga Tatatertib melalui Ketua Polis daerah atau Ketua Jabatan anda dalam tempoh 21 hari daripada tarikh anda menerima surat ini.

[48] Based on the paragpraph, I am satisfied that an ample opportunity for the applicant to explain himself had been given by the first respondent. As an addition to that, it must be highlighted here that the applicant had already made a written representation dated 16 July 2014 whereby the applicant had admitted the charges alleged against him and he stated his deespet regrets for his actions.

[49] Therefore, in my view the applicant's right to be heard was not infringed in any manner by the first respondent.

WHETHER THE DECISION MAKING PROCESS WAS TAINTED WITH ILLEGALITY, IRRATIONALITY AND PROCEDURAL IMPROPRIETY

[50] In regard to this issue, it was submitted on behalf of the applicant by his solicitor that the disciplinary offences complained of is absence from work and the only difference among the charges is the dates. However, the final decision by the first respondent is quite bizarre and defies logic.

[51] It was stated by the applicant's solicitor that having considered the written representation that was addressed on all of the charges, the first respondent and the disciplinary board decided to impose the penalty of warning for the first four charges. Then, they imposed the penalty of fine of RM50 only on the next three charges. But, for the rest of the charges, the most severe punishment of dismissal was imposed.

[52] Further, it was then submitted by learned counsel for the applicant that any reasonable tribunal or decision maker with the advantage of the same materials and having perused the written representation would have arrived that is more consistent in respect of all of the charges.

[53] The decision of the respondents to dismiss the applicant for the last eight charges while imposing much lighter penalty for the other fits the description of the expression employed by Lord Diplock in the case of *Council*

of Civil Service Unions and others v Minister for the Civil Service [1984] 3 All ER 935; [1985] AC 374 to explain the concept of irrationality which is stated as follows:

> A decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

[54] On behalf of the respondents, the learned SFC had submitted that the disciplinary authority had assiduosly complied with the procedure stipulated under the 1993 Regulations. The applicant was accorded with the right to be heard as entrenched in the 1993 Regulations and in the Federal Constitution.

[55] It was also submitted that on the totality of the evidence before this court, that the disciplinary authority had acted within its jurisdiction and duties by considering whether the dismissal of the applicant for the charges against him was justified and in accordance with the law. It is abundantly clear that there were no procedural improprieties or irregularities by the disciplinary authority.

[56] The learned SFC referred to the case of *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153; [1998] 1 CLJ 405. It was held by the Federal Court that:

> The disciplinary tribunal of a professional body is the best judge of the seriousness of the misconduct of its members; it would require an exceptional case to enable a court to interfere with its decision in respect of punishment. Likewise, an employer, including a government, is the best person to judge the seriousness of the misconduct of its employees.

[57] The Federal Court further held that:

> ... the test is not what the Court of Appeal or the High Court thinks should be the appropriate penalty. Whether dismissal or a lesser penalty (like a reduction in rank) was appropriate is not for the court to say. The court must not substitute its own views as to what is the appropriate penalty (for the employee's misconduct) for the view of the particular employer concerned.

[58] Based on the applicant's submissions, I believe that the essence of this issue is in relation to the proportionality of the punishments given by the respondents in the order which led to the decision making process to be tainted with illegality, irrationality and procedural impropriety, as it was argued by the applicant's solicitor.

[59] Following the decision of the Federal Court in *Ng Hock Cheng*'s case, this court has no justification to interfere with the decisions or punishments

given by the first respondent and the disciplinary body since they are the best parties to judge the misconducts done by the applicant and the proper disciplinary actions to be taken against the applicant.

[60] This court can only interfere when there is an obvious irrationality in the decision making process.

[61] In this present case, the respondents had complied with the requisite statutory procedures in coming to the disciplinary determination against the applicant.

[62] Therefore, this court will not interfere with the order made by the respondents since there was no element of illegality, irrationality or procedural impropriety.

CONCLUSION

[63] Based on the above reasons, I hereby dismissed the application with costs of RM3,000 to be paid by the applicant to the respondents, subjected to the allocatur fees.

Application dismissed with costs of RM3,000 subject to allocator fees.

Reported by Sivaguru Paramasivam